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Supreme Court of the United States.

October Term, 1934.

No. 78.

David G. Dimick,
Petitioner,

v.

Peter Schiedt,
Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

BRIEF FOR RESPONDENT.

JOHN G. PALFREY,
Attorney for Respondent.

CHARLES F. ALBERT,
RICHARD J. WALSH,
RICHARD J. COTTER,
Of Counsel.

ADDISON C. GETCHELL & SON, LAW PRINTERS, BOSTON.

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Supreme Court of the United States.

OCTOBER TERM, 1934.

No. 78.

DAVID G. DIMICK, PETITIONER,

v.

PETER SCHIEDT, RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR RESPONDENT.

OPINIONS BELOW.

The opinions of the Circuit Court of Appeals are reported in 70 Federal (2d) 558, and appear in the record, commencing at page 39. No opinion was delivered by the District Court, but the order made by that court on the plaintiff's motion for new trial, from which the appeal was prosecuted, appears in the record at page 7.

STATEMENT OF FACTS.

The plaintiff-respondent, a citizen of Massachusetts, brought this action against the petitioner, a citizen of Maine, alleging substantial personal injuries caused by the peti-

tioner's negligent operation of an automobile on a public way in Massachusetts. The case was tried before a jury, who returned a verdict in favor of respondent in the sum of $500 (R. 7). The evidence (which forms part of the record, pp. 9-37) tended to show that the plaintiff, if entitled to recover at all, was entitled to more than $500 for the suffering, loss of wages, and medical expenses incurred (R. 45). Accordingly, the plaintiff-respondent moved for a new trial, urging that the verdict was against the weight of the evidence, that it was a compromise verdict and illegal, and that the damages were inadequate (R. 7). The trial court made the following order in disposing of the motion for new trial (R. 7):

> "On the authority of *Gaffney* v. *Illingsworth,* 90 N.J.L. 490, and *Carr* v. *Miner,* 42 Ill. 179, if the defendant will file in this case a stipulation consenting to an increase of $1,000 in the damages from the sum of $500., as found by the jury, to $1,500. on or before April 21, 1933, the plaintiff's motion for a new trial is to be denied. Otherwise, it is to be granted and the case tried *de novo,* both on the question of liability and damages."

The petitioner filed the stipulation, and judgment was entered for the respondent in the sum of $1500, plus interest and costs (R. 9). The respondent perfected his exception to the order and duly prosecuted an appeal from the judgment to the Circuit Court of Appeals for the First Circuit (R. 8, 38, 39). That court, after hearing, rendered its judgment reversing the judgment of the District Court and remanding the case to the District Court for further proceedings not inconsistent with the opinion (R. 51). The judgment was by a majority of the court, Morton, Circuit Judge, dissenting. The present petition asks this Court to reverse the decision of the Circuit Court of Appeals.

Constitutional Provision and Statutes Involved.

Constitution of the United States, Seventh Amendment:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Judicial Code, section 269, as amended (U.S.C. Title 28, sec. 391):

> "All United States courts shall have power to grant new trials, in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law . . ."

United States Code, Title 28, sec. 770:

> "The trial of issues of fact in the district courts, in all causes except cases in equity and cases of admiralty and maritime jurisdiction, and except as otherwise provided in proceeding in bankruptcy shall be by jury."

Question Involved.

The sole question involved is whether, in an action to recover for personal injuries, the judge of the District Court has power to make an order that, if the defendant will consent to increase the damages as found by the jury by an amount specified by the court, the plaintiff's motion for a new trial is to be denied, but otherwise to be granted, and, upon the defendant's consenting, to enter judgment, over the plaintiff's objection, for the increased amount.

Summary of the Argument.

I. There can be no doubt that the action of the trial court was subject to review by the Circuit Court of Appeals. Appellate courts have power to review rulings of law made in connection with motions for a new trial. The trial judge clearly indicated that he was making a ruling of law as to his power and the proper disposition of the motion. After a finding that the verdict was erroneous, the proper disposition of the motion was a matter of law rather than of discretion. The respondent's contention that the order deprived him of a constitutional right required consideration by the appellate court.

II. No precedent at common law has been cited for the order of the trial court, and none can be found. The two cases cited by the judge do not support it. A review of English, federal, and state cases shows that they are in fact opposed to the exercise of any such power. This lack of precedent is sufficient ground for, and requires, affirmance of the judgment of the Circuit Court of Appeals.

III. The federal statute governing new trials furnishes no authority for the order. The statute in effect incorporates the practice of courts of law generally, subject to the Constitution of the United States, but the general law as shown above, does not sanction the practice which the trial judge seeks to introduce.

IV. The order violates rights secured to the respondent by the Seventh Amendment. The order, in effect, is a determination of the quantum of damages by the court, and deprives respondent of the right to have them correctly assessed by the jury. It also amounts to a re-examination of a fact tried by a jury otherwise than according to the rules of the common law. The order is not justified by the analogy of *remittitur* cases. The decision of the Circuit Court of Appeals is rightly placed also on the constitutional ground, and should be affirmed.

Argument.

I. The action of the trial court in disposing of the motion for a new trial was subject to review by the Circuit Court of Appeals.

While no argument was made in the Circuit Court of Appeals attacking its power to review the disposition made by the trial court of the respondent's motion for a new trial —and the present brief for the petitioner merely suggests incidentally that such power may be wanting—we concede that it was the duty of that court to notice its own want of power to review, if in fact it had no such power.

But there is ample authority sustaining the power to review the order made in this case. The proposition that no federal appellate court may review for error of fact the action of the trial court in granting or denying a new trial, a rule in no way impugned by the respondent, necessarily implies the correlative proposition that the appellate court may review and correct rulings of law made in connection with such action.

> *Fairmount Glass Works* v. *Cub Fork Coal Co.*, 287 U.S. 474, 482 (1932).

In the opinion last cited this Court said:

> "Under certain circumstances the appellate court may enquire into the action of the trial court on a motion for a new trial. Thus, its denial may be reviewed if the trial court erroneously excluded from consideration matters which were appropriate to a decision on the motion, *Mattox* v. *United States*, 146 U.S. 140; *Ogden* v. *United States*, 112 Fed. 523; or if it acted on the mistaken view that there was no jurisdiction to grant it, or that there was no authority to grant it on the ground advanced, *Felton* v. *Spiro*, 78 Fed. 576, 581;

Dwyer v. *United States,* 170 Fed. 160, 165; *Paine* v. *St. Paul Union Stockyards Co.,* 35 Fed. (2d) 624, 626-628."

The following language from *Felton* v. *Spiro* we believe correctly summarizes the reviewability of action in connection with motions for a new trial:

> "It is only when the court in the exercise of its discretion to grant or refuse a new trial does so upon all competent evidence, and under a correct view of the law, that its judgment is not the subject of review, and when, instead of leaving it to be presumed that the court below acted under a correct conception of the law, that court distinctly states on record the view of the law by which the court was controlled, no reason is perceived why this is not subject to review" (73 Fed. at 95).

Of course, the making of the conditional denial of a new trial carries with it the ruling that the trial judge has power to make such an order. But the trial judge in this case went further. "On the authority of *Gaffney* v. *Illingsworth,* 90 N.J.L. 490, and *Carr* v. *Miner,* 42 Ill. 179," is clearly an indication that the judge believed and was ruling as matter of law that he had power to require the plaintiff, if the defendant agreed, to accept such damages as he, the judge, should award instead of submitting the question to another jury. There could scarcely be a plainer statement on the record of the view of the law and authorities by which the action of the court was controlled.

If the ruling of the trial judge in *Felton* v. *Spiro,* 78 Fed. 576, *supra,* and in the *Dwyer* (170 Fed. 160) and *St. Paul Union Stockyards* (35 Fed. (2d) 624) cases, to the effect that he had no power to grant or deny the new trial for the

reasons stated, was properly subject to review, equally so must be the ruling that the trial judge has power to deny the new trial, which he otherwise would grant, because the defendant has agreed to pay something more than the jury awarded against him.

The decision of this Court in the *Fairmount Glass Works* case, *supra* (287 U.S. 474), does not prevent review of the trial court's order. The Circuit Court of Appeals here has not done and was not asked to do what the appellate court did in that case. In that case the trial court absolutely denied the new trial. In its view, the damages awarded by the jury were not clearly inadequate. It made no ruling of law. Consequently, no error was committed which an appellate court could revise, and this Court so held.

In the present case, in order to make even the conditional order for a new trial, the trial court must have found as a fact at least one of the reasons urged by the respondent for his motion, namely, that the damages are inadequate. The fact that a new trial was to be granted on both liability and damages is perhaps consistent with the inference that he may have found also that the verdict is against the evidence and the weight of the evidence. But it can probably be assumed, in favor of his action, that he did not find that the verdict was a result of compromise or illegality, but rather that the jury merely erred in assessing the damages; otherwise the verdict could not stand at all.

Minneapolis, St. Paul & Sault Ste. Marie Ry. Co. v. *Moquin,* 283 U.S. 520 (1931).

Schuerholz v. *Roach,* 58 F. (2d) 32, 34 (1932, C.C.A. 4).

It is not true, however, as stated in the petitioner's brief (page 4) that "nothing except inadequacy of damages is argued by the respondent." The respondent's position at the argument before the Circuit Court of Appeals was, and

it still is, that the trial court must have found to be true some one of the three grounds alleged in the motion for new trial, or else he would not have disturbed the verdict even conditionally. From the nature of the order made, it is highly probable that the court found that the damages were inadequate. But as no alleged error is predicated upon the finding—and of course none could be so predicated under the rules above stated—it is unnecessary to inquire further what was the finding of the trial court.

The trial court did, however, find the verdict erroneous for some reason, and having found it erroneous, could not thereafter have denied the new trial absolutely and entered judgment thereon. The occasion was no longer appropriate for the use of judicial discretion in deciding whether to grant or deny the new trial. The proper judicial action was required, and the duty of the trial judge imperative. Whether, in making the conditional order here made, he performed that duty is, on all the authorities, a proper subject for inquiry by the appellate courts.

Stetson v. *Stindt*, 279 Fed. 209, 212 (1922, C.C.A. 3).

United Press Ass'ns v. *National Newspapers Ass'n*, 254 Fed. 284, 286 (1918, C.C.A. 8).

Glenwood Irr. Co. v. *Vallery*, 248 Fed. 483, 485 (1918, C.C.A. 8).

Pugh v. *Bluff City Excursion Co.*, 177 Fed. 399, 401 (1910, C.C.A. 6).

It is true that the cases cited were all cases where the jury brought in a verdict awarding less damages than the amount required by the specific instructions of the court. But there is no distinction between such a case and that now before the Court, where the trial judge has found, in effect, that the damages awarded were less than the amount required by

the facts in the light of applicable law. In both cases, the jury have erroneously applied the law given them. If the appellate courts could review the trial court's action in denying a new trial in the former cases, the power to review must also exist in the present case.

We submit, moreover, that there is no merit in the suggestion by the petitioner that the case of *Arkansas Valley Land & Cattle Co.* v. *Mann,* 130 U.S. 69, 76, presents objections to reviewing the order in question. We repeat that the respondent has not asked the Circuit Court of Appeals, and that court has not undertaken, to review the judge's finding that the verdict was erroneous. But we do maintain that whether he took the proper action in disposing of the motion for a new trial after making such a finding is a question of law which may be passed on by the appellate courts. If there is any logical inference from language in the Arkansas case—and we believe there is none—that the trial judge might have made a finding that the verdict was excessive and, nevertheless, have rendered judgment thereon for the full amount without any fear of revision on appeal, we can only urge that such language was unnecessary to the decision and that it should not and does not represent the law.

Finally, it must be remembered that the respondent has urged constantly that the order made by the trial court denies him a right, secured him by the Constitution, to have his damages assessed correctly by a jury. The right which the respondent demands is that right which, in the language of the late Chief Justice (see *Felton* v. *Spiro,* 78 Fed. 576, at 581), is "accorded to a party litigant for the correction by the trial court of injustice done by the verdict of the jury. It is one of the most important rights which a party to a jury trial has."

That the respondent's contention is not frivolous is clear from the fact that the majority of the judges in the Circuit

Court of Appeals have been persuaded thereby. The respondent certainly is entitled to have a competent court pass on the merits of his contention. It is unthinkable, therefore, that federal appellate courts should be precluded from reviewing such an order as that made in this case when such order is claimed to violate rights secured by the Constitution.

In summary, therefore, the power of the Circuit Court of Appeals to review the present order is fully sustained—

(1) Because the trial court expressly indicated that he was making a ruling of law;

(2) Because his finding that the verdict was erroneous called for proper action in disposing of the motion for a new trial; and—

(3) Because the order made was claimed to violate the constitutional rights of the respondent.

II. No precedent has been cited for the order of the District Court, and none can be found.

The Circuit Court of Appeals put its decision on two grounds: that the action of the trial judge was not warranted by any precedent in the common law or by statute, and that, being unknown to the common law, it was a practice precluded by constitutional limitations embodied in the Seventh Amendment.

The first ground is not refuted by the petitioner, and alone is sufficient to sustain the judgment. Unless there is common-law or statutory sanction, the power of a federal court, or any court, to increase a verdict without the consent of the parties cannot exist.

The researches of counsel for both parties have failed to show any precedent for the action of the trial court. The independent extensive search made by the circuit judges (R. 42, 46; 70 F. (2d) 560, 562) discovered no case to support

it. The trial court purported to base his order on the authority of *Gaffney* v. *Illingsworth*, 90 N.J.L. 490, and *Carr* v. *Miner*, 42 Ill. 179, indicating that to his mind the power to make the order existed by virtue of general principles of the common law. Though the brief for the petitioner (page 15) practically concedes that the two cases cited do not support the ruling of the trial judge, we propose to show, not only that these cases are beside the point, as the Circuit Court of Appeals found (R. 40, 70 F. (2d) 559), but also that such general authorities as might be considered pertinent to the issue are unanimously opposed to the ruling.

Gaffney v. *Illingsworth*, 90 N.J.L. 490 (1917), was a case where the plaintiff's rule for a new trial had been granted, subject to be denied if the defendant should pay the plaintiff a sum in excess of the jury's verdict within ten days after the court's order. The defendant, instead of paying, appealed from the order, and the rule for a new trial became absolute. The decision of the New Jersey court goes no further than to hold that the trial court acted within its discretion in granting a new trial, under the New Jersey statute, and that the exercise of its discretion could not be reviewed. No question was raised or discussed as to the plaintiff's right to object to such an order. A careful examination of New Jersey decisions citing this case shows that no subsequent decision has followed it as authority for making such an order.

Carr v. *Miner*, 42 Ill. 179, was decided by the Supreme Court of Illinois in 1866. The defendant had conceded his liability for interest at 10%, but the jury erroneously computed the interest at 6%. The trial court denied the plaintiff's motion for a new trial on condition that defendant would consent to increase the verdict by an amount equal to the difference between interest figured at 6% and at 10%. The defendant consented. On the plaintiff's appeal, the

order was affirmed. That the decision was strictly limited to the facts of the case appears from the following language of the court (p. 192):

> "If there were no other grounds requiring a new trial to be granted, and we see none, then, when that was corrected, there was no error in overruling the motion. It was a case in which the amount could be calculated with certainty when the basis was found. The pratice is one that should be sparingly indulged, and should never be adopted except in clear cases."

This case was followed in *James* v. *Morey,* 44 Ill. 352, 354, decided in 1867, where the error in the jury's verdict could be corrected by reference to the terms of a lease. It is significant that never since *James* v. *Morey* has the *Carr* case been cited in Illinois for the proposition for which it has now been taken as authority by the trial court in the case at bar.

From the foregoing analysis of the cases cited by the trial judge, the conclusion is apparent that they do not justify his order. We proceed, therefore, to the examination of the authorities generally, which for convenience will be divided into three parts, dealing respectively with English, federal, and state cases.

(*a*) *English cases.*

It takes but slight investigation of the English law to prove that such action as the trial court took in disposing of the respondent's motion for a new trial would not be tolerated in England.

Watt v. *Watt,* [1905] A.C. 115, a decision by the House of Lords, holds that the court has no power to alter a jury's verdict without the consent of *both* parties except by ordering a new trial.

Although this case has been criticized and condemned in the opinion of the dissenting circuit judge and in the brief for the petitioner, the fact remains that it represents the result of a careful review of the existing English authorities. That it further represents the law of England is clear from *Lionel Barber & Co.* v. *Deutsche Bank,* [1919] A.C. 304, 314.

Much emphasis has been placed by the petitioner in his brief (page 9) on certain old English cases referred to in Annotated Cases 1916 B, at page 384, and the dissenting opinion also refers to Buller's Nisi Prius (7th edition) p. 21*a* (R. 50, 70 F. (2d) 56). A challenge was presented by the possibility that these might reveal some ancient decision to support the trial court's order.

The cases referred to in these passages are:

Tripcony's Case, Dyer, 105*a* (1554).
Hooper v. *Pope,* Latch, 223 (1627).
Davis v. *Foliot,* Style, 310 (1651).
Jervis v. *Lucas,* Style, 345 (1652).
Austin v. *Hilliers,* Hardres, 408 (1665).
Cook v. *Beal,* 1 L. Raym. 176 (1697).
Burton v. *Baynes,* 1 Barnes, 153, Buller's N.P. p. 21*a* (1733).
Smallpiece v. *Buckingham,* Buller's N.P. 21*a*.
Brown v. *Seymour,* 1 Wils. (1742).

In these cases, all of which were actions for mayhem, the court *en banc* seems to recognize a right on its part to increase the plaintiff's damages "*super visum vulneris.*" That these cases furnish no precedent for the action of the District Court is, however, clear for four reasons:

(1) The increase could only be made by the court *en banc* and never by the trial judge. *Cook* v. *Beal,* 1 L. Raym. 176, *supra.* (That an increase may not be made by a federal

appellate court was the express holding in *Fairmount Glass Works* v. *Cub Fork Coal Co.*, 287 U.S. 474, *supra.*)

(2) The damages could be increased only in mayhem cases.

Austin v. *Hilliers,* Hardres, 408, *supra,* where Chief Baron Hale says:

> ". . . but if the Declaration does not expresly alledge a Mayhem, there we cannot increase them."

Jervis v. *Lucas,* Style, 345, *supra.*
Cook v. *Beal,* 1 L. Raym. 176, *supra.*

(3) In all the cases the plaintiff was the party who asked the court to re-examine his wound and make the increase. The plaintiff thus expressly waived his right to have another jury pass on the question, if, indeed, at the date of these cases, the right to a new trial because of the inadequacy of the damages awarded could be said to have been established.

(4) The practice of increasing the damages in mayhem cases was obsolete even at the time the Constitution was adopted. The last known case is *Brown* v. *Seymour,* 1 Wils. 5, *supra,* in 1742, and the court there refused to increase the damages.

Mayne, on Damages (10th ed. 1927), 579.
Cf. *McCoy* v. *Lemon,* 11 Rich. (S.C.) 165, *infra.*

That the obsolete rule applied in mayhem cases was never carried over to other cases is further indicated by *Jackson* v. *Williamson,* 2 T.R. (Durnford & East) 281 (1778). This was an action against a sheriff for wrongfully selling a lighter. The sheriff's sale brought only £31, but the evidence showed the fair value to be £60. The jury found a verdict of £30, and the plaintiff obtained a rule to show

cause why the verdict should not be amended to the larger figure. The court refused to permit the increase.

Baker v. *Brown,* 2 M. & W. 199 (1836), involved a motion by the plaintiff to increase his damages by adding interest. The defendant had defaulted and the failure to include interest was due to the inadvertence of counsel. The court denied the motion.

Phillips v. *South Western Ry. Co.,* 4 Q.B.D. 406, and 5 Q.B.D. 78 (1879), was an action by a physician for personal injuries. The jury awarded £7000 and the plaintiff moved for a new trial on the grounds of the inadequacy of the award. The court found that the jury had failed to include certain items of damage. The court, nevertheless, concluded (per James L.J.):

> "I am of the opinion and I believe my colleagues are also of opinion, for the same reasons and upon the same grounds, that the damages are unreasonably small, to what extent of course we must not speculate and have no business to say."

This investigation of the English cases leads to the result that there is no English authority to conflict with the logical conclusion from *Watt* v. *Watt,* [1905] A.C. 115, *supra,* namely, that the order which the trial court made in this case would not now be, and never was, permissible in England.

Belt v. *Lawes,* 12 Q.B.D. 356 (1884), a decision expressly overruled in *Watt* v. *Watt* as not consistent with the prior authorities, has finally been seized upon by the petitioner and the dissenting judge in a labored search for English authority to support the ruling in question. One of the Lords Justices in his opinion supposes a case not unlike the present, and concludes: "I am far from saying that the Court would not have power in favor of the defendant and

in his interest, to say that the damages given are too small, but that if the defendant will agree to their being increased to such a sum as may be stated, a new trial shall be refused." That there was nothing to support this dictum is apparent from the criticism of the case by Lord Davey (see [1905] A.C. 122):

> "No authority for the proposition laid down in *Belt* v. *Lawes* is quoted by the learned judges in that case, and no authority earlier than that case was brought to our attention by Mr. Matthew in his very careful argument. On the other hand there are numerous dicta of learned judges to the contrary."

Although the argument carries some persuasion that a decision by the House of Lords in 1905 should not be used to determine the meaning of the Constitution in 1789, the fact remains that the English law, unfettered by limitations of a Seventh Amendment, not only furnishes no precedent for the practice which the district judge has attempted to institute, but actually condemns it as violative of fundamental rights.

(*b*) *Federal cases.*

The petitioner in his brief (page 6) frankly admits that there is no federal precedent for the action of the judge of the District Court, but maintains that there is nothing against it. As it is unusually difficult to dissociate the approach of the federal cases to the present problem in its general aspects from the approach in its constitutional aspect, only a few federal cases can be adequately discussed at this point.

Stetson v. *Stindt,* 279 Fed. 209 (1922, C.C.A. 3), was an action based on a promissory note where the plaintiff should

have recovered the amount of the note or nothing. The jury were so instructed, but returned a verdict for one-half the amount of the note. The Circuit Court of Appeals for the Third Circuit held that refusal by the trial court to grant a new trial under such circumstances constituted reversible error, saying:

> (P. 211) "It is not sufficient to say that the defendant cannot complain because he was not injured. He was injured by being deprived of the right of a litigant to have the jury determine his liability under the law as laid down by the court."

Glenwood Irrigation Co. v. *Vallery,* 248 Fed. 483 (1918, C.C.A. 8), was a case based on negligent injury to property where, although the defendant's liability was in issue, the amount of damages was definitely ascertained. During the trial it appeared in evidence that the plaintiff carried a certain amount of insurance on the property injured. The trial court instructed the jury that, if the plaintiff was entitled to recover anything, he should be awarded the ascertained amount of damages, and that no deduction could be made because of the existence of insurance. The verdict, however, was obviously the result of deducting the amount of the insurance from the ascertained amount of damages. Both parties excepted to the verdict and sued out writs of error to review the judgment entered upon it. The Circuit Court of Appeals ordered the judgment reversed on plaintiff's writ of error, with direction to grant a new trial.

In these cases the only issue to be determined by the jury was the question of liability, and that in each case was resolved in favor of the plaintiff. The damages were liquidated and ascertained. If the power to increase the verdicts to the correct figure existed, the facts of these cases clearly called for the exercise of such power. Yet in none of

the cases did the court attempt to alter the verdict; in each case it merely set aside the verdict and ordered a new trial.

Somewhat similar to these cases was the decision in *Original Sixteen to One Mine, Inc.*, v. *Twenty-One Mining Co.*, 254 Fed. 630 (1918, Dist. Ct. N.D. Cal.). The jury returned the following verdict:

> "We, the jury, find in favor of the plaintiff and assess the damages against the defendant in the sum of $100,000, less cost of extraction of the ore, on account of unwillful trespass."

The cost of extraction of the ore was disclosed by the defendant's statements, and the plaintiff moved for a judgment in the amount of $100,000, less the cost as disclosed on the statements. The defendant moved for a new trial. On granting the latter motion the court said (p. 633):

> "If the jury finds in favor of the plaintiff and there is no dispute over the amount of the recovery, it seems somewhat technical to deny to the court the power to supply the omission from the undisputed facts, but such seems to be the law of the land."

Discussion of the remaining federal cases which may be regarded in point will be postponed until the constitutional aspect of the case is reached. But from the few cases already discussed, it seems that the failure of the federal courts to exercise the power of increasing the verdict to an amount liquidated and admittedly correct must be regarded as convincing proof that they have no power to increase the verdict where the sum due, if any, is wholly unliquidated. Therefore, though none of the cases deals with the power of the court to make a conditional denial of a new trial, it is submitted that they are all opposed in theory to the existence of any such power.

(c) *State cases.*

As the court will not be assisted by a discussion of state cases where a verdict was increased with the consent of both parties, or cases where, though a conditional order was made, the defendant declined to comply with the condition, so that the order ultimately stood as an order for a new trial, we shall for completeness merely collect them in the footnote.* These cases are not urged, either by the dissenting judge in the Circuit Court of Appeals or by the petitioner, as authority for making such an order without the plaintiff's consent. The plaintiff in these cases obtained the new trial which he sought, and had no occasion to object to the order. That such an order would not be enforced without the plaintiff's consent is apparent from the language of the Wisconsin court in a recent case among this group:

> "Where, in a case involving unliquidated damages, the amount found by the jury is deemed by the court wholly inadequate, it seems clear that the trial court may grant a new trial unless the plaintiff consents to take judgment for such increased amount found by the court to represent the least amount that an unprejudiced jury would probably find. Since the court finds the 'least amount' the plaintiff must be given an option to consent to the amount of damages found by the court. In such a situation the defendant may not complain because the court has only increased the damages to the least amount which it will permit to stand in lieu

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*Cases where the verdict was increased with the consent of both parties are *Adamson* v. *County of Los Angeles*, 52 Cal. App. 125; *Richards* v. *Sandford*, 2 E. D. Smith (N.Y.) 349, *semble*.

Cases where the conditional order denying a new trial if defendant would consent to increase the damages became an absolute order because the defendant refused to consent are *Gaffney* v. *Illingsworth*, 90 N.J. L. 490; *Risch* v. *Lawhead*, 211 Wis. 270, 278 (1933); *Campbell* v. *Sutliff*, 193 Wis. 370; *Reuter* v. *Hickman, Lauson & Diener Co.*, 160 Wis. 284; *Gosczinski* v. *Carlson*, 157 Wis. 551; *Hillman* v. *City of Seattle*, 163 Wash. 401; *Clausing* v. *Kershaw*, 129 Wash. 67; *Bernard* v. *No. Yakima*, 80 Wash. 472; *Ford* v. *Minn. St. Ry. Co.*, 98 Minn. 96.

of granting a new trial" *Risch* v. *Lawhead*, 211 Wis. 270, 278 (1933).

Such cases as are strictly in point—where, over the plaintiff's objection, the court has attempted to dispense with a new trial upon the defendant's consenting to an increase in the damages to a figure satisfactory to the court—have uniformly held, upon appeal by the plaintiff, that the trial court's action could not be sustained.

Both the dissenting judge in the Circuit Court of Appeals and the petitioner undertake to distinguish the leading case, *Shanahan* v. *Boston & Northern St. Ry. Co.*, 193 Mass. 412 (1907). That was a case where, in actions to recover damages for personal injuries alleged to have been caused by the negligence of the defendant, the jury returned verdicts for the defendant and the plaintiffs moved for a new trial. Thereupon an order was entered granting the motions unless on or before a certain date the defendant consented to the entry of judgment in favor of the plaintiffs in specified amounts. On appeal by the plaintiffs this order was held to be error.

The dissenting judge (R. 50, 70 F. (2d) 564) says that the distinction between that case and the case at bar is that there "the finding of the jury on liability was disregarded by the trial judge in an effort to impose his views on the parties" while "Here the trial judge accepted the jury's verdict as to liability. The part of his order which is objected to relates only to damages." The judge based his conclusion upon his further argument that "The law recognizes a distinction between questions of liability and amount of damages, *e.g.*, agreements for arbitrating the former were at one time regarded as against public policy, but agreements for the arbitration of damages were held valid."

The position taken by the petitioner in his brief (page 17), is similarly based upon the supposed distinction between re-examination of the fact of liability and superintending the jury's estimate of damages. Elsewhere in the brief he frankly states his theory that, in a tort case "liability or no liability is surely a fact . . . but when we come to placing an estimate in dollars and cents upon the extent of damage we may all be at a loss to know as to whether there is any such certainty or fixed character about this feature of the case as to dignify a jury's estimate of the monetary value of damages as a 'fact' " (page 9).

Neither the dissenting judge nor the petitioner cites a single case as authority for this alleged distinction; and we believe none can be found. On the contrary, as stated in Reeve's History of the Common Law (quoted in *Watt* v. *Watt*, [1905] A.C. 119):

> "There was always this distinction between trial by jury and mere inquisition or inquiry by a jury to assess damages (i. e., after default) that in the latter case the inquisition was only to inform the mind of the Court and it was at their discretion whether they would award judgment for the amount found by the jury whereas upon a trial they had no jurisdiction to interfere as to the amount of damages."

The question remains whether there is a substantial distinction between the *Shanahan* case and the case at bar. True, in the *Shanahan* case the jury's verdict had been unfavorable to the plaintiff on both liability and damages. The trial judge then did two things: (1) substituted a favorable for an unfavorable verdict on liability, (2) substituted verdict for $200 and $500 in the cases, respectively, for a verdict of no damages in each case. On plaintiffs' appeal, the Massachusetts court held that they had been prejudiced by

the trial judge's action. For the purposes of this comparison the important inquiry is wherein the plaintiffs were prejudiced. Certainly they were not prejudiced by the ordering of verdicts in their favor on the question of liability. It is obvious that the actual prejudicial factor in the *Shanahan* case, as in the case at bar, was the imposition on the plaintiffs of an amount of damages unacceptable to them, and never determined by a jury.

The cases, therefore, are closely akin, and, as the action of the trial court was held prejudicial to the plaintiffs in the *Shanahan* case, so the action of the District Court must be held to have injured the plaintiff in the case at bar.

Somewhat analogous to the *Shanahan* case was the earlier decision of *Phillips* v. *Granger,* 134 Mass. 475 (1883). This was an action on a promissory note for $400. The defendants set up a counterclaim for $368. The jury returned a verdict for the defendants, which the court set aside. The defendants moved that they be allowed to remit $32, and that judgment should be entered for the plaintiff in this amount. The plaintiff would not consent. The court denied the motion, and its action was held right.

Minot v. *Boston,* 201 Mass. 10 (1909), was a petition for damages on taking of an easement by eminent domain, where the verdict failed to include interest from the date of the taking. Upon motion by the plaintiff, the court made an order directing the clerk to add interest to the amount of the verdict. The Supreme Judicial Court said (p. 12):

> "No authority is given to add to this verdict a further sum. The assessment of the amount due is not to be made in part by the jury and in part by the court, but wholly by the jury."

Werner v. *Bryden,* 84 Cal. 472; 258 P. 138 (1927), was an action for seduction. On plaintiff's motion for a new

trial, the court ordered that the motion should be granted unless the defendant would stipulate that judgment for $1500 might be entered for the plaintiff. The defendant stipulated and judgment was entered. On plaintiff's appeal, the judgment was reversed and a new trial ordered, the appellate court saying:

> "The question is not whether the amount fixed by the court is a reasonable sum to be allowed as damages, but the plaintiff has the constitutional right to have such damages assessed by a jury."

In *Lorf* v. *City of Detroit,* 145 Mich. 265 (1906), an action for personal injuries, the jury found for plaintiff, but awarded her six cents damages. The trial court, satisfied that the plaintiff had sustained substantial damage, ordered a new trial "unless the defendant shall elect to pay $100 in settlement of the case with actual cost of the plaintiff and her witnesses." The Michigan Supreme Court reversed this order and granted a new trial, saying (at p. 267):

> "We have been unable to find any case sustaining this holding and we think it was unauthorized and erroneous."

Goldsmith v. *Detroit, Jackson & Chicago Ry.,* 165 Mich. 177 (1911), was an action to recover for personal injuries. On motion of the plaintiff for a new trial on the issue of damages, the trial court ordered "that a new trial be granted to the said plaintiff in said cause unless the said defendant within 10 days from this date pay to the said plaintiff the sum of $300; . . . and if said plaintiff declines and refuses to accept the same, then it is ordered and decreed by this court that the motion for a new trial is denied." The upper court, reversing this order, said (p. 179):

> "When a trial judge, before whom a case has been tried, is of the opinion that substantial justice has not been done, and it is his opinion that a new trial should be had, we are very loath to disagree with him. By annexing a condition that defendant should pay plaintiff $300., the trial court has made it manifest that in his opinion substantial justice was not done in the premises. We cannot, however, agree with him as to his right to annex such a condition. It was equivalent to the trial court himself assessing the damages. This is the province of the jury."

And to the same effect is the decision in *Stanton* v. *Foley*, 168 Mich. 453, 456 (1912).

In view of the reliance placed by the petitioner and the dissenting judge in the few old English mayhem cases referred to above, the decision of the South Carolina court in *McCoy* v. *Lemon*, 11 Rich. 165 (1856), though not strictly in point, may be of considerable interest. In consequence of a brawl between the plaintiff and defendant, the former lost the sight of one eye and a thumb. In an action for the injury he was awarded only thirty dollars by the jury, and obtained a rule to show cause why the damages should not be increased. The court refused to increase damages on the theory that "no court possesses the power to increase or diminish the damages in due form found by a jury in any other way than by granting a new trial." The appellate court likewise refused to order an increase in the damages, saying (p. 174):

> "Not a single case has been found in any book of American Reports in support of the present motion . . . Neither has there been for more than a century any recognition of the rule by any case in England."

This review of the English and American cases must confirm the statement that the order of the trial judge in the

present case is wholly without precedent. The fact that no court has ever been permitted, over the plaintiff's objection, to fix a sum to be paid by the defendant as a condition of denying the plaintiff's motion for a new trial, we repeat, establishes conclusively that the courts have no such power under the Anglo-American system of jurisprudence, and furnishes an argument against the judgment in question which the petitioner has not answered and which, the respondent believes, is unanswerable.

III. The federal statute governing new trials does not authorize the order of the District Court.

The Judicial Code, sec. 269, as amended (United States Code, Title 28, sec. 391) reads (so far as material to this case):

> "All United States Courts shall have power to grant new trials, in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law . . ."

The power of a federal trial court to grant a new trial, thus being established by a law of the United States, is not subject to state law and not controlled by the Conformity Act.

Indianapolis & St. Louis R.R. Co. v. *Horst,* 93 U.S. 291, 301 (1876).

United States v. *Train et al.,* 12 Fed. 852, 853 (1882, C.C. Mass.).

(The present case, of course, presents the question in negative form, that is, reasons for which new trials have usually been *denied.* But it seems reasonable to infer that the rule applies to the power to *deny,* as well as to *grant,* new trials.)

Although federal practice regarding new trials is not governed by the Conformity Act, the argument on page 17 of the petitioner's brief is by no means true that state court citations are of no value in connection with this problem, and that "There is sufficient discussion of the powers of the Court in the decisions of this Court and the Federal Courts to solve the problem with the assistance of the logic of the Constitution and the history of jury trial at common law, with reference to the action of the State Courts."

The language of the federal statute indeed makes that statute a sort of conformity act, referring, as it does, to the "reasons for which new trials have usually been granted in the courts of law . . ." (U.S.C. Title 28, sec. 391). This language does not confine the inquiry to the practice of federal courts, but makes relevant an inquiry into the practice of courts of law generally. And since this is a statute, and not the Constitution, which is being interpreted, the inquiry would not appear to be confined to the practice of courts of law in 1789, at the time the statute was first adopted. Certainly the district judge, who must be assumed to have been cognizant of the federal statute, took the view that decisions of the Illinois and New Jersey courts in 1866 and 1917, respectively, could be cited as authority for his ruling on a motion for a new trial in his court. We concur with his view so far as it admits the usefulness of state court decisions in construing the federal statute, although denying the authority of the particular two cases cited. This view, of course, is subject to the limitation that decisions from the state or English courts, to form the basis of action under the somewhat broad language of the federal new trial statute, must not violate the Seventh Amendment to the Constitution of the United States.

The authorities examined in the second point of this brief, *supra,* subject to the Seventh Amendment, are therefore important in determining the construction of the

language of the statute: "reasons for which new trials have usually been granted in the courts of law." It is unnecessary to repeat in detail the discussion of general authority, both in this country and in England. Its application here is obvious. Since the courts of law of states of this country and the highest English court have not only failed to sanction the action taken by the District Judge, but actually have denounced such action when the question was raised, it is obvious that his ruling on the respondent's motion for a new trial was wrong under the statute because utterly unfounded on precedent in the courts of law.

IV. The order of the District Court violates rights secured to the respondent by the Seventh Amendment to the Constitution.

The judgment of the Circuit Court of Appeals, as we have stated above, was placed on two grounds: That the action of the trial judge was not sanctioned by precedent or statutory authority and that it amounted to a usurpation of functions of the jury and a re-examination of facts in violation of the Seventh Amendment to the Constitution.

The respondent urged in his brief in opposition to the writ of certiorari and still believes and urges that the first ground requires, and of course is sufficient reason for, affirmance of the judgment, apart from the constitutional ground.

But the Seventh Amendment requires that —

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Two rights are guaranteed the respondent by this constitutional provision: A right to have all the issues in controversy settled by a proper verdict of a jury and a right that no fact tried by a jury should be otherwise re-examined than according to the rules of the common law.

We maintain first that, when the district judge caused judgment to be entered for the respondent for an amount of damages determined by himself after finding, as he must have found, that the verdict of the jury was erroneous, he invaded the province of the jury and deprived the respondent of his right, guaranteed by the Amendment, to have his damages correctly determined by a jury.

Questions concerning the respective province of court and jury have from time to time come before this Court, and the Seventh Amendment has been held not to prohibit the adoption of modern forms of procedure where the substance of the constitutional right is preserved.

> *Gasoline Products Co.* v. *Champlin Co.*, 283 U.S. 494, 498 (1930).
> *Ex parte Peterson*, 253 U.S. 300, 309 (1920).

Certain fundamental propositions have, however, never been departed from, and among them is the rule that "The court could not, consistently with the constitutional right of trial by jury, submit a part of the facts to the jury, and, itself, determine the remainder without a waiver . . . of verdict by the jury." *Hodges* v. *Easton*, 106 U.S. 408, 412 (1882). Or, as restated by Justice Matthews in *Baylis* v. *Travellers' Ins. Co.*, 113 U.S. 316, 320, 321 (1884):

> ". . . But, without a waiver of the right of trial by jury, by consent of parties, the court errs if it substitutes itself for the jury, and passing upon the effect of the evidence, finds the facts involved in the issue, and renders judgment thereon.

> "That is what was done in the present case. It may be that the conclusions of fact reached and stated by the court are correct, and, when properly ascertained, that they require such a judgment as was rendered. That is a question not before us. The plaintiff in error complains that he was entitled to have the evidence submitted to the jury, and to the benefit of such conclusions of fact as it might justifiably have drawn; a right he demanded and did not waive; and that he has been deprived of it, by the act of the court, in entering a judgment against him on its own view of the evidence, without the intervention of a jury."

Walker v. *Southern Pacific Railroad,* 165 U.S. 593 (1897), is cited in both opinions rendered in the Circuit Court of Appeals because of its liberality. The Court there says of the Seventh Amendment (p. 596):

> "Its aim is not to preserve mere matters of form and procedure but substance of right. This requires that questions of fact in common law actions shall be settled by a jury and that the court shall not assume directly or indirectly to take from the jury or to itself such prerogative."

The same principle was further recognized in *Slocum* v. *New York Life Ins. Co.,* 228 U.S. 364, at 387 (1912), where, in discussing the cases cited above, the Court said:

> "They show that it is the province of the jury to hear the evidence and by their verdict to settle the issues of fact, no matter what the state of the evidence, and that while it is the province of the court to aid the jury in the right discharge of their duty, even to the extent of directing their verdict where the insufficiency or conclusive character of the evidence warrants such a direc-

> tion, the court cannot dispense with a verdict or disregard one when given and itself pass on the issues of fact. In other words, the constitutional guaranty operates to require that the issues be settled by the verdict of a jury unless the right thereto be waived."

It is, moreover, of great significance that the dissenting justices in the *Slocum* case, in an opinion written by the present Chief Justice, based their argument largely on the proposition that, after the appellate court decided that a verdict should have been directed, "there was no fact to be tried by a jury; the case as made was barren of any such fact" (228 U.S. 401), and distinguished cases cited in the majority opinion on the ground that such cases had "obvious reference to cases of disputed questions of fact with which it is the province of the jury to deal. Facts once tried by a jury are not re-examined and the court is not to substitute its judgment of the facts for the judgment of the jury, but, in such case, should order a new trial" (228 U.S. 423).

The unanimous opinion of the nine justices who heard the *Slocum* case, therefore, supports the respondent's contention that the trial judge was not at liberty to substitute his estimate of the damages suffered by the respondent for the judgment of a jury as to the amount of such damages, and that in so doing he deprived the respondent of a constitutional right.

The petitioner has argued in his brief (pages 10-11) that the respondent cannot urge he has been deprived of a trial by jury because the jury found in his favor on the question of liability and merely erred in assessing damages. It may be assumed that the respondent would have been delighted if his motion for a new trial had been granted upon the limited issue relating to damages. But the order of the District Court was that, if the defendant declined to stipulate, the case was to be "tried *de novo* both on the question

of liability and damages," thus indicating to his mind that the two issues were inseparable. The finding, necessarily implied from the order, that the verdict was erroneous leads to but one conclusion, namely, that the issues of fact were not found by the jury and that they, or at least some issues, remained to be determined. In such case he could no more cause judgment to be entered for the amount of damages determined by himself than a trial judge can enter judgment for one party when the verdict is rendered for the other though erroneous in law.

Cf. *Pederson* v. *Delaware, L. & W. R. Co.*, 229 U.S. 146, 153 (1912).

Where the governing principles which must decide this case are so clear from decisions of this Court, it is perhaps unnecessary to cite additional cases from the lower federal courts in support of the respondent's contention.

Stetson v. *Stindt*, 279 Fed. 209, 212, *supra*, a decision by the Circuit Court of Appeals for the Third Circuit, and *Glenwood Irrigation Co.* v. *Vallery*, 248 Fed. 483, 486, *supra*, in the Eighth Circuit, have already been discussed, as showing that the court has no power to increase the damages even when the amount is undisputed.

To the same effect is *Ohio Valley Bank* v. *Greenbaum Sons Co.*, 11 F. (2d) 87, 89 (1926, C.C.A. 4), where the jury found separate verdicts against two defendants, the sum of which equaled the plaintiff's claim, for which the defendants, if liable at all, were jointly liable. The plaintiff moved to have the court enter judgment for the sum of the verdicts against both defendants. The court said:

> "This in effect would be to set aside the verdict of the jury and substitute for it the judgment of the court in establishing the extent of the liability . . . This cannot be done. Constitution of the United States, Amendment 7."

Since no power exists in the court to render judgment for an amount in excess of the verdict when the damages are liquidated or undisputed, clearly no such power can exist where the damages are unliquidated as in a personal injury case. The attempt of the court to exercise such a power must, therefore, be regarded as a usurpation of the function of the jury, and, where such exercise is without consent of a party, it certainly amounts to a deprivation of his right to trial by jury.

We now turn to consider the second part of the Seventh Amendment, which prohibits the re-examination of facts tried by a jury otherwise than according to the rules of the common law. There is no dispute that the quantum of damages was one of the facts tried by the jury, upon which their finding was $500. This fact could therefore be re-examined by the trial judge only according to the rules of the common law. We maintain, therefore, that when the district judge caused judgment to be entered for an amount of damages determined by himself, he further violated the rights of the respondent under the second part of the Amendment.

Kennon v. *Gilmer,* 131 U.S. 22 (1889), strongly supports this position. In this case the plaintiff recovered a large verdict, but the territorial Supreme Court, under statute authority to deal with motions for a new trial, ordered the judgment reduced by $10,000. Both parties appealed, and this Court reversed the order, saying (p. 27):

> "The judgment of the Supreme Court of the Territory, reducing the amount of the verdict and the judgment of the inferior court thereon, without submitting the case to another jury or putting the plaintiff to the election of remitting part of the verdict before rendering judgment for the rest was irregular and so far as we are informed unprecedented . . . And in a case in which damages for a tort have been assessed by a

> jury at an entire sum, no court of law, upon a motion for a new trial for excessive damages and for insufficiency of the evidence to support the verdict is authorized, according to its own estimate of the amount of damages which the plaintiff ought to have recovered, to enter an absolute judgment for any other sum than that assessed by the jury."

No ground for distinction exists between the court's action in the *Kennon* case and that attempted by the trial court here. In the former the court compelled the plaintiff to accept a different sum from that awarded by the jury. So in the case at bar. Nothing turns on the fact that in one case the sum was less and in the other greater than the amount of the verdict. The difficulty in each case is that the court is re-examining a fact found by a jury otherwise than "according to the rules of the common law."

This phrase has been interpreted in numerous decisions, but perhaps no interpretation is so concise as that by Justice Story in *Parsons* v. *Bedford,* 3 Pet. 433, 448 (1834), as follows:

> "The only modes known to the common law to re-examine such facts are the granting of a new trial by the court where the issue was tried or to which the record was properly returnable; or the award of a *venire facias de novo* by an appellate court, for some error of law which intervened in the proceedings."

The same judge previously said in *United States* v. *Wonson,* 1 Gall. 5, 20 (1812):

> "Now according to the rules of the common law the facts once tried by a jury are never re-examined, unless a new trial is granted in the discretion of the court, before which the suit is depending, for good cause shown;

or unless the judgment of such court is reversed by a superior tribunal, on a writ of error, and a venire facias de novo is awarded. This is the invariable usage settled by the decision of ages."

In the case of *Capital Traction Company* v. *Hof*, 174 U.S. 1, 7 (1889), the Court said:

"A comparison of the language of the Seventh Amendment, as finally made part of the Constitution of the United States, with the Declaration of Rights of 1774, with the Ordinance of 1787, with the essays of Mr. Hamilton in 1788, and with the amendments introduced by Mr. Madison in Congress in 1789, strongly tends to the conclusion that the Seventh Amendment, in declaring that 'no fact tried by a jury shall be otherwise re-examined, in any court of the United States, than according to the rules of the common law,' had in view the rules of the common law of England, and not the rules of that law as modified by local statute or usage in any of the States.

"This conclusion has been established, and 'the rules of the common law' in this respect clearly stated and defined, by judicial decisions."

The word "re-examine" as used in the Constitutional Amendment has therefore come to have the meaning "redetermine." Of course the court, under the rules of the common law of England, could re-examine the evidence, in the ordinary sense of the word, to see whether a new trial should be granted.

Cf. *Miller* v. *Maryland Casualty Co.*, 40 F. (2d) 463, 465 (1930, C.C.A. 2).

But it could not redetermine any fact found by the jury, whether that fact related to the damages or any other issue of the case.

In time there grew up what has been referred to by eminent English judges as "the somewhat unconstitutional proceeding" (see [1905] A.C. 119) of the courts in refusing to give the plaintiff judgment on a verdict when the judge thought the damages excessive. The plaintiff was, however, given his choice of taking a new trial or accepting judgment for a less amount.

It soon became evident that there was as much a miscarriage of justice when the damages were too small as when they were too large, and the right to grant a new trial for the former reason also became established. But the review of the English cases earlier in this brief shows that the English judges never attempted to give the plaintiff the "Hobson's choice" of accepting an amount of damages determined by the court or the admittedly inadequate award of the jury. While, therefore, under the rules of the common law of England, the trial judge could refuse to receive the verdict and send the case to a new jury, he could never, without at least the plaintiff's consent, enter judgment for any sum other than that determined by a jury.

Cf. *Kennon* v. *Gilmer,* 131 U.S. 22, 29, *supra.*

It may be thought that some of the cases cited in connection with this part of the argument, though they would be controlling if the verdict had been increased over the objection of the defendant, are distinguishable because the plaintiff is the objecting party. But we recur to the issue before the court, which is the power of the District Court to make the order and enter the judgment complained of.

This power is circumscribed by the federal statute which requires that "the trial of issues of fact in the district

courts, in all causes except cases in equity and cases of admiralty and maritime jurisdiction, and except as otherwise provided in proceeding in bankruptcy shall be by jury" (U.S.C. Title 28, section 770). In determining any issue of fact where a jury trial has not been waived, the court acts in excess of its authority and in violation of the statute.

Morgan's Executor v. *Gay,* 19 Wall. 81, 83 (1873).
Baylis v. *Travellers' Ins. Co.,* 113 U.S. 316, *supra.*

The second part of the Seventh Amendment, as we have seen, also places a strict limitation on the power of the court. If the court acts in excess of its powers, its action is erroneous in law and must be reversed. Whether the constitutional or the statutory limitation be considered, it has been shown that the trial judge exceeded his authority in making the order in question. The net result of his action has been to prevent the respondent from having an impartial jury correctly assess the damages which the respondent sustained as a result of the petitioner's negligence.

Under the Constitution "Each party, the losing as well as the winning, has a right to the legitimate trial by jury, with all its safeguards, as understood when the Constitution was adopted."

Capital Traction Co. v. *Hof,* 174 U.S. 1, at 16, *supra.*
United States v. *1363 Bags of Merchandise,* 2 Sprague, 84, 87 (1863).

As the order denied rights secured to the respondent by the Constitution, the judgment was properly reversed by the Circuit Court of Appeals and its ruling should be affirmed.

In answer to the objection that the order of the trial judge violated rights of the respondent secured by the Seventh

Amendment, the dissenting judge and the petitioner stress a supposed analogy between that order and the practice of remittiturs.

The reasoning of the dissenting opinion is as follows: Since the use of remittiturs implies power in the trial judge to determine the upper limit of reasonable damages (R. 47), there is a lower limit which is equally for him to determine. Admittedly, on the lower side the question is complicated by the possibility of compromise on the issue of liability as an explanation of the inadequate award. Assuming that in remittitur cases the intention of the jury is to give the highest damages legally possible, the trial judge should have power to state the minimum reasonable amount, as in remittitur cases he can fix the maximum. Asserting that neither in the remittitur case nor in the case at bar has the jury determined the amount of damages, the opinion concludes: "But this does not prevent remittiturs and, as I have said, I can see no distinction affecting the powers of the trial judge, between them and the order made in this case—which might perhaps be termed an 'additur' " (R. 48).

The petitioner's argument is somewhat different: Remittiturs are justified, he says (page 15), on the ground that the defendant cannot complain because he is getting something at the hands of the court which he has asked the court as a matter of discretion to give him, and the plaintiff has assented. The plaintiff is the prevailing party; the motion is made by the losing party; the act of the court, by whatever preliminaries it is preceded, is essentially a denial of the motion, and is founded in the discretion of the court. As a matter of everyday language, the petitioner continues, the respondent in the case at bar, dissatisfied with the amount of the jury's award, cannot be said to be the prevailing party (page 16). By this test, he concludes, the respondent cannot complain of the court's order.

There can be no quarrel with the assertion by the dissenting judge that the trial judge has power to determine the lower, as well as the upper, limit of reasonable damages, provided that the power is limited to determining whether a verdict should or should not be disturbed. But the assumption that the jury, where damages are excessive, intended to give the highest damage legally permissible, is not necessarily sound. All that the trial judge can be assumed to know is that the damages are excessive in view of the evidence. So long as it does not appear that the excess was caused by passion and prejudice, it is not for an appellate court to speculate on the reasons for it. Even less sound is the converse assumption, that where the damages are inadequate the jury intended to give the lowest amount legally permissible. The dissenting opinion admits that on the lower side the question is complicated by the possibility that compromise regarding liability explains the small award. This possibility cannot be ignored, since, if it were true, the verdict would be tainted and open to objection by both parties. *Minneapolis, St. Paul & Sault Ste. Marie Ry.* v. *Moquin,* 283 U.S. 520. But compromise and intent to give the smallest possible amount are not the only possible assumptions. If the inadequacy be explained by mistake or ignorance, as well it might, this would apply to mistake or ignorance regarding what constituted a generous as well as a niggardly award.

The assumption that the jury intended to give the lowest possible amount being eliminated, the argument that the plaintiff is not aggrieved when given that amount by the judge instead of a new trial, fails. If the amount awarded be admittedly inadequate, who but another jury can, within the spirit and letter of the Seventh Amendment, determine what amount a jury, within reasonable limits, would consider proper?

The petitioner's reasoning is objectionable at the outset, in so far as it is based upon the assumption that the respondent, for the purpose of the case at bar, must be said to be the "losing party," and therefore, as loser, cannot complain of the exercise of the trial court's discretion. Certainly the respondent cannot accurately be said to be the "losing party" to any degree comparable to the defendant in the remittitur cases. In the latter cases the defendant has nothing to lose and everything to gain, while in this case the respondent has prevailed to the extent of establishing liability and is prepared to pay a substantial price to have the verdict set aside.

But without extending the discussion of this argument, it may be pointed out that the "losing party" test is by no means infallible. Once again, we repeat the principle that, under the Constitution, "Each party, the losing as well as the winning, has a right to the legitimate trial by jury." (*Capital Traction Co.* v. *Hof*, 174 U.S. 1, 16, *supra*). Moreover, the very ground upon which the petitioner distinguishes the *Shanahan case* (193 Mass. 412, *supra*) is that in that case the plaintiff was even more a loser than in the case at bar, since the jury's verdict had been adverse on liability as well as on damages. Certainly, it cannot be argued that the plaintiff there was aggrieved by having the trial judge change the jury's unfavorable verdict to a favorable one on liability. Yet, admittedly, that change is the only detail in which that case differs from the case at bar. The *Shanahan* case, therefore, is authority squarely against the petitioner's "losing party" argument.

But, we submit, neither the dissenting judge's method of analogy, based on assumption as to the jury's intention, nor the petitioner's, based on the "losing party" theory, recognizes the fundamental differences between remittiturs and the order in the case at bar.

The fact is that in remittitur cases, as the majority opinion in the Circuit Court of Appeals points out (R. 45), the jury has already awarded an amount including, but in excess of, the amount which the trial judge deems reasonable. In terms of figures, if the jury has awarded $5000 ($3000 plus $2000) and the trial judge decides that $3000 is the highest amount that could be found to be reasonable, judgment, on remittitur, is entered for a sum which the jury has already included in its finding: The sum is known from its inclusion in the jury's express verdict. But no such contention can be made for the judgment entered by the District Court in the case at bar. The jury, incorrectly, has failed to find more than $500. But to inquire how much more *they* would have found above that amount is to speculate about something that has never actually happened.

The dissenting opinion (R. 48) places considerable emphasis upon *Arkansas Valley Company* v. *Mann,* 130 U.S. 69 (1889), and kindred cases upholding the constitutionality of remittiturs.

That there is, however, no necessary progression from approving remittiturs to approving the action taken here by the District Court is apparent from the fact that, in all of the states where the question has been raised and decided contrary to such a practice, remittiturs are recognized and approved, either by decision or by statute.

Shanahan v. *Boston & Northern Street Ry. Co.,* 193 Mass. 412, *supra.*

Phillips v. *Granger,* 134 Mass. 475, *supra.*

Werner v. *Bryden,* 84 Cal. App. 472, *supra.*

Carpentier v. *Gardner,* 29 Cal. 160, 165 (1865).

Lorf v. *City of Detroit,* 145 Mich. 265, *supra.*

Goldsmith v. *Detroit, Jackson & Chicago Railway,* 165 Mich. 177, *supra.*

See *Risch* v. *Lawhead,* 211 Wis. 270, *supra.*

Were there a logical conflict with reference to the constitutional question between the *Arkansas Valley* case and the cases just cited, the federal case would of course govern. But no conflict exists. One may question the authority upon which the *Arkansas Valley* decision is based—for example: although the question was whether the practice of remittiturs was sanctioned at the time of the adoption of the Constitution of the United States, the earliest case cited is a decision by Mr. Justice Story at *nisi prius* in 1822, *Blunt* v. *Little,* 3 Mason, 102, in which, however, there is no discussion of the problem, and no citation of authority whatever —nevertheless, the constitutionality of remittiturs has been too long settled to be brought into question again.

Constitutional interpretation is often as much a matter of history as of logic. That, in the final analysis, is the decisive explanation why, if all other distinction between remittitur and "additur" fails, the one practice may be permitted and the other condemned by the Constitution.

We accept the premise upon which the *Arkansas Valley* case rests, namely, that remittiturs were known to the English common law at or about the time of the adoption of the Constitution. (The decision of course came many years before *Watt* v. *Watt,* [1905] A.C. 115, in which finally they were condemned. And see *Pickwood* v. *Wright,* 1 H. Bl. 642 (1791).)

Resting on this premise, the practice of remittiturs satisfies the Seventh Amendment. But orders of the kind made by the District Court in the case at bar were not known to the common law. They, therefore, do not satisfy the Seventh Amendment. It cannot possibly be said that such orders relate only to matters of practice when they are so subversive of the rights of the parties. And there is no inconsistency between the reasoning in the *Arkansas Valley* case and that which the respondent asks this Court to adopt.

Search into the cases on remittiturs revealed to counsel no authority for the apparently novel order by the District Court. Neither the petitioner nor the dissenting judge cites such authority. We believe none exists. To repeat here the discussion of the English cases (see pages 12-16, *supra*) would serve no useful purpose, so we limit ourselves now to pointing out that the sole reference in the dissenting opinion to English law in the seventeenth and eighteenth centuries, Buller's Nisi Prius (7th ed.) (1817), p. 21*a*, relates only to the cases of mayhem which have already been distinguished and were obviously of a quasi-criminal procedure.

This last, the historical, distinction between the order in the case at bar and remittiturs is the unanswerable reason why, as a matter of constitutional interpretation, practices which in superficial detail are similar, nevertheless fall on opposite sides of the line.

For the reasons given above we believe that the Circuit Court of Appeals justifiably decided that the respondent was denied the right to trial by jury guaranteed by the Constitution of the United States. This right required the determination of all issues of fact by the proper verdict of a jury; it required as well that no fact so determined should be otherwise re-examined than according to the rules of the common law. Decisions of this Court and of lower federal courts on analogous cases have made clear that interference with a jury's verdict by the trial and appellate courts will not be countenanced unless authorized by sound authority. The attempt by the petitioner and by the dissenting judge to find such authority, by analogy to remittiturs, or otherwise, fails because the analogy does not exist, either logically or historically.

Conclusion.

We respectfully submit that the decision of the Circuit Court of Appeals for the First Circuit, reversing the judgment of the District Court and remanding the case to that court for further proceedings not inconsistent with its opinion, should be affirmed.

JOHN G. PALFREY,
Attorney for the Respondent.

Charles F. Albert,
Richard J. Walsh,
Richard J. Cotter,
Of Counsel.